93-685

No.

Supreme Court, U.S.
FILED
NOV - 1 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ATLANTIC HEALTHCARE BENEFITS TRUST, NATIONAL INSURANCE CONSULTANTS, INC., UNITED HEALTH ASSOCIATION OF AMERICA, *et al.*,

Petitioners,

v.

ROBERT R. GOOGINS, COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. SINGER
2705 Bayview Drive
Suite B
Manhattan Beach, CA 90266
(310) 545-3826
Counsel of Record for Petitioners Atlantic Healthcare Benefits Trust, et al.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA) PREEMPTS THE STATE OF CONNECTICUT FROM OUTLAWING SELF-FUNDED MULTIPLE-EMPLOYER ERISA WELFARE BENEFIT PLANS UNDER THE GUISE OF PERMISSIBLE STATE REGULATION BY DECLARING SUCH PLANS TO BE ILLEGAL INSURANCE COMPANIES THAT MUST RESTRUCTURE AS STATE-LICENSED INSURANCE COMPANIES OUTSIDE THE SCOPE OF ERISA IN ORDER TO PROVIDE EMPLOYEE BENEFITS TO CONNECTICUT RESIDENTS;

2. WHETHER THE STATE OF CONNECTICUT'S FAILURE TO ENACT LEGISLATION SPECIFICALLY DESIGNED TO REGULATE SELF-FUNDED MULTIPLE-EMPLOYER ERISA PLANS AND PROSECUTION OF SUCH PLANS UNDER EXISTING STATUTES DESIGNED TO REGULATE INSURANCE COMPANIES VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION.

PARTIES TO THE PROCEEDING

Petitioners ATLANTIC HEALTHCARE BENEFITS TRUST; JEFFREY C. NEAL, as Trustee of ATLANTIC HEALTHCARE BENEFITS TRUST, UNITED HEALTHCARE ASSOCIATION OF AMERICA, INC. AND NATIONAL INSURANCE CONSULTANTS, INC., were plaintiffs-appellants in Civil Action No. 92-7955 below.

Respondents ROBERT R. GOOGINS, COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT; AND THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT were defendants-appellees below.

The parties before this Court are the same as the parties below.

United Healthcare Association of America, Inc. and National Insurance Consultants, Inc. have no parent or subsidiary corporations.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION OF THE COURT	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. THE COURT OF APPEALS' DECISION RAISES IMPORTANT ISSUES CONCERNING THE ABILITY OF SMALL BUSINESS EMPLOYERS TO POOL RESOURCES IN ORDER TO SELF-FUND A BENEFIT PROGRAM UNDER ERISA AND CONFLICTS WITH DECISIONS BY THIS COURT AND OTHER COURTS OF APPEAL	8
II. THE COURT OF APPEALS' DECISION RAISES AN IMPORTANT CONSTITUTIONAL ISSUE CONCERNING THE ABILITY OF STATES TO USE A LIMITED EXCEPTION TO ERISA PREEMPTION OF STATE INSURANCE REGULATION TO PROHIBIT MULTIPLE EMPLOYER ERISA PLANS FROM OPERATING UNDER ERISA TO PROVIDE BENEFITS TO RESIDENTS OF A STATE BY REQUIRING SUCH PLANS TO RESTRUCTURE AS INSURANCE COMPANIES IN ORDER TO BE REGULATED EXCLUSIVELY BY THE STATE AND ONLY IF THE STATE ELECTS TO ISSUE AN INSURANCE LICENSE AND CONFLICTS WITH DECISIONS BY THIS COURT	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases Page

Atlantic Healthcare Benefits Trust v. Googins, 1993 U.S. App. LEXIS 19774 (2d Cir. Aug. 3, 1993) .. 1
Florida Lime & Avacad. Growers v. Paul, 373 U.S. 132 (1963) 14
FMC Corp. v. Holliday, 111 S.Ct. 403 (1990) 8, 11, 14
In Re Affiliated Food Stores Inc. Group Ben. Tr., 134 B.R. 215 (N.D. Tex. 1991) 14
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 11
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1989) .. 13
United Wire Welfare Fund v. Morristown Mem. Hospital, 995 F.2d 1179, 16 EBC 2182 (3d Cir. 1993) 13

Statutes and Congressional Material

28 U.S.C. § 1254(1) 2
29 U.S.C. § 1001, *et seq.* 4
29 U.S.C. § 1002(1) 6, 9
29 U.S.C. § 1002(40) 6, 9
29 U.S.C. § 1103(c)(1) 9
29 U.S.C. § 1104(a)(1)(A) 12
29 U.S.C. § 1132(e)(1) 6
29 U.S.C. § 1144 ..... 2, 10
29 U.S.C. § 1144(b)(6)(A)(ii) 9
Conn. Gen. Stat. § 38a-72 12
Constitution of the United States, Amendment 14.. 3, 4
Rule 56, F.R.Civ.P. 6
128 *Cong.Rec.House* 30367 (Dec. 13, 1982) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No.

ATLANTIC HEALTHCARE BENEFITS TRUST,
NATIONAL INSURANCE CONSULTANTS, INC.,
UNITED HEALTH ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

ROBERT R. GOOGINS, COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Atlantic Healthcare Benefits Trust, *et al.*, (Atlantic) respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on August 3, 1993.

OPINIONS BELOW

The Second Circuit Court of Appeals' opinion (available on Westlaw, 1993 WL 286792, and LEXIS, 1993 App. LEXIS 19774) is reprinted in the appendix (App.) at p. 1a. The district court decision, No. 2:92cv00212

(PCD) (D.C.Conn. July 27, 1992), is reprinted in the appendix at p. 12a. Bulletin Number HC-43, issued by the Connecticut Insurance Commissioner on July 25, 1990, is reprinted in the appendix at 18a.

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on August 3, 1993, and no Petition for Rehearing was filed. This Court has jurisdiction to review the judgment of the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

29 U.S.C. § 1144. Other Laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

* * * *

(2)(A) Except as provided in subparagraph (B), nothing in this chapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such

a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

* * * *

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangements to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

* * * *

Constitution of the United States of America, Amendment 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case [1] concerns a critical health care access issue. Specifically, at issue is the ability of small business employers to band together and pool resources in order to self-fund a program of health benefits for their collective employees. The framework for self-funded employee beneft plans is set forth in the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1001 *et seq.* Without the self-funding alternative to traditional health insurance (which in many cases is either prohibitively expensive or simply unavailable to certain businesses), the number of Americans without health insurace would far outnumber the current estimate totaling 37 million people.

ERISA provides for three primary forms of self-funded employee benefit plans: single-employer plans (usually formed by large corporations and companies under common control), "multiemployer" plans formed pursuant to collective bargaining efforts of organized labor unions, and "multiple employer welfare arrangements" (MEWAs), generally involving smaller businesses joined through an association of employers. With respect to self-funded single-employer and union plans, ERISA unequivocally provides an exclusive regulatory scheme and contains an

[1] A companion petition for certiorari to the Third Circuit filed concurrently (*Atlantic Healthcare Benefits Trust v. Foster*) discusses the identical issues in the context of the Pennsylvania insurance licensing statute. Consequently, certain elements of the Statement of the Case and Reasons for Granting the Writ appear in both petitions.

expansive preemption provision that prohibits states from regulating such entities under state insurance laws. Self-funded MEWAs that qualify as plans under ERISA are also within the federal regulatory scheme but are subject to a limited exception to preemption which allows the application of state insurance regulations which are not inconsistent with Title I of ERISA.

Ambiguities regarding the preemption exception pertaining to MEWAs have resulted in states adopting differing approaches to regulating such plans, making it difficult and in some cases impossible for such plans to provide benefits to residents of several states, as envisioned by Congress in enacting ERISA. Many states have enacted legislation specifically designed toward regulating self-funded MEWA ERISA plans. Other states have elected to allow such plans to provide benefits without state regulation. Several states, however, have exceeded their regulatory authority under the preemption exception by issuing bulletins or press releases declaring that self-funded MEWA ERISA plans are "illegal insurers" that must cease operation as ERISA trusts and obtain a certificate of authority to transact the business of insurance, requiring restructuring and capitalization as a corporate insurance entity outside the federal regulatory scheme and completely a creature of state regulation, and allowed to provide benefits only upon the discretionary approval and issuance of an insurance license by the State. The State of Connecticut has followed the latter approach, making a public effort to prohibit its residents from obtaining employee benefits through such plans. *See* app. p. 18a.

1. The District Court Action.

Atlantic Healthcare Benefits Trust is a self-funded trust organized in February 1991 pursuant to ERISA by United Healthcare Association of America (UHAA) and administered by National Insurance Consultants, Inc. (NIC). Atlantic was established by UHAA and is maintained and controlled by a benefit committee representative of the

employees who participate in the trust, which provides a pool of employer contributions from which to pay health and welfare benefits on behalf of the employer members of UHAA, the employees of such members and the dependents of such employees. Accordingly, Atlantic qualifies as an employee welfare benefit plan under ERISA, 29 U.S.C. § 1002(1), organized as a self-funded MEWA, 29 U.S.C. § 1002(40).

The Connecticut Department of Insurance (DOI) has adopted a policy that all self-funded MEWAs, including both those that qualify as employee welfare benefit plans under ERISA and those that do not, are unauthorized insurers under the insurance provisions of the Connecticut Statutes. App. p. 18a. The DOI began an investigation of Atlantic and indicated it would be issuing an order requiring it to cease and desist providing benefits. In response, Atlantic brought an action for declaratory and injunctive relief against the DOI Commissioner in U.S. District Court seeking a determination that the trust qualified as a plan under ERISA and that regulatory efforts by the State of Connecticut requiring it to restructure as an insurance company and operate outside the scope of ERISA were preempted. Jurisdiction in the action was predicated on the exclusive federal jurisdiction provisions conferred on cases brought by plans and plan fiduciaries to determine rights under ERISA, 29 U.S.C. § 1132(e)(1).

Following the filing of the complaint, the parties filed cross motions for summary judgment pursuant to Rule 56, F.R.Civ.P. Atlantic asserted it was an ERISA benefit plan and that the Connecticut statutes invoked against Atlantic by the DOI in an attempt to regulate it as an insurance company were inconsistent with and hence preempted by ERISA. Specifically, Atlantic asserted that the requirement of a certificate of authority to transact the business of insurance would remove any plan from the regulatory ambit of ERISA and bring it wholly within the state regulatory scheme.

The DOI asserted that as a matter of law, regardless of whether Atlantic qualified as an employee benefit plan under ERISA, as a self-funded MEWA it was subject to state insurance regulation requiring licensing as an insurance company and prosecution under unauthorized insurer statutes for providing employee benefits without a certificate of authority.

The district court did not rule on the issue of Atlantic's qualification as an ERISA plan but found that "the Commissioner seeks to regulate plaintiffs' enterprise in conformity with local insurance codes which are found not to be preempted by ERISA." App. p. 16a. Summary judgment was granted in favor of the defendant Insurance Commissioner and the action dismissed.

2. The Second Circuit Court of Appeals' Decision.

The Second Circuit affirmed the district court decision. The Second Circuit rejected arguments by Atlantic that the Connecticut insurance licensing scheme is inconsistent with and preempted by ERISA. The court ruled that a trust can become licensed as an insurance company under Connecticut law and apparently disagreed with Atlantic and the Congressman who authored the MEWA amendment that the transformation into an insurance company effectively removes a plan from federal regulation and places it solely within the state scheme. App. pp. 9a-10a. The Second Circuit refused to follow decisional law requiring a specific regulatory scheme for ERISA plan MEWAs and held that regulation of ERISA plans as insurance companies under existing laws designed solely for non-ERISA plans was envisioned by Congress in creating the MEWA amendment to ERISA. App. pp. 8a-9a. Finally, the Second Circuit ruled that funding a plan as an insurance company, payment of premium taxes and contributions to a claims guarantee fund for insolvent insurance companies did not result in the expenditure of funds other than for the exclusive purposes of paying benefit claims

and administrative expenses solely inuring to the benefit of Atlantic but instead constituted reasonable administrative expenses in the form of state regulatory fees. App. p. 10a. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION RAISES IMPORTANT ISSUES CONCERNING THE ABILITY OF SMALL BUSINESS EMPLOYERS TO POOL RESOURCES IN ORDER TO SELF-FUND A BENEFIT PROGRAM UNDER ERISA AND CONFLICTS WITH DECISIONS BY THIS COURT AND OTHER COURTS OF APPEAL.

This case raises an important issue regarding health benefits, a topic that is on the forefront of discussion across the entire nation. With historic efforts currently under way to work toward a solution to the country's health care crisis, the action of the State of Connecticut to increase the number of uninsured Americans through a crusade to eliminate self-funded multiple employer benefit plans borders on the unconscionable. The decision of the Second Circuit condones the use of ERISA by the States to take away the right to self fund health benefit programs that Congress has expressly given and which Congress determined not to withdraw when it amended ERISA to provide for limited State regulation concurrent with the full scope of federal regulation. Since such State action is inconsistent with Congressional intent and preempted by ERISA, this Court should grant *certiorari* to resolve interpretative ambiguities, approaches and conflicts among the states and enunciate a clear explication of ERISA preemption as applicable to self-funded MEWAs.

This Court has examined the scope of permissible state regulation with respect to self-funded ERISA plans and firmly ruled that all regulation under state insurance laws is preempted. *FMC Corp. v. Holliday*, 111 S.Ct. 403

(1990). The State of Connecticut Department of Insurance and the Second Circuit have apparently chosen to limit this Court's ruling in *FMC* so as to be inapplicable to self-funded MEWAs. Yet the identical justification set forth in *FMC* (referring to several articles outlining the inability of pre-ERISA state insurance statutes to effectively regulate uninsured or self-funded benefit programs) exists supporting preemption of state insurance licensing laws imposed upon multiple employer plans.

The fact is that a licensing requirement is a ruse under the guise of permissible state regulation utilized by states such as Connecticut to abolish self-funded plans. The State of Connecticut is motivated by an ancestry of traditional insurance influence and views self-funded plans as competitive enemies to traditional insurance concerns that pay generously into the state coffers through premium taxes and mandatory contributions to claims guarantee funds. ERISA plans are immune from such obligations under strict fiduciary principles that require all plan assets to inure solely to plan participants for the payment of benefits claims and reasonable administrative expenses. 29 U.S.C. § 1103(c)(1). Transforming an ERISA plan into an insurance company would result in subjection of the plan to these state economic burdens and compel the subsidization of programs outside the ERISA plan contrary to fiduciary obligations.

Congress enacted ERISA to provide a federal regulatory framework for employee pension and health plans and specifically created a mechanism for self-funding benefit plans by providing in 29 U.S.C. § 1002(1) that benefits may be funded "through the purchase of insurance or otherwise." Plans offering benefits to the employees of two or more employers may self-fund a pooled benefit program under the definition of MEWA in Section 1002 (40), subject to limited state regulation under 29 U.S.C. § 1144(b)(6)(A)(ii), the exception to ERISA's broad preemption clause at issue in this case.

The language of ERISA's preemption clause reads, in pertinent part, as follows: "Except as provided in subsection (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

The "savings clause" in the subsequent subsection provides limits to preemption: "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." Section 1144(b)(2)(A). Thus, insurance companies are not afforded protection against state laws regulating insurance by virtue of the savings clause.

The "deemer clause," immediately following the savings clause, makes emphatically clear that *no benefit plan described in Section 1003 may be deemed to be an insurance company or other insurer* "for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts." Section 1144(b)(2)(B) (emphasis supplied).

In 1982, in reaction to complaints about a small number of fraudulent schemes resembling ERISA plans, the Erlenborn-Burton Act was passed, creating 29 U.S.C. Section 1144(b)(6)(A). This provides a limited exception to the preemption rules for MEWAs. A distinction is made between fully insured MEWAs and self-insured or partially insured (through the purchase of stop loss or reinsurance coverage) MEWAs. In regard to self-funded (and partially insured) MEWAs, such as Atlantic, the amendment provides that, *in addition to ERISA*, "any law of any state which regulates insurance may apply *to the extent not inconsistent with the preceding sections of this subchapter.*" 29 U.S.C. Section 1144(b)(6)(a)(ii) (emphasis added).

Congress thus intended the federal regulatory scheme of ERISA under the jurisdiction of the U.S. Department

of Labor to continue to govern benefit plans, potentially supplemented by additional, limited application of some state insurance regulations. This conclusion is confirmed in the legislative history of the amendment, particularly the Congressional record: "With respect to multiple employer welfare arrangements which do not meet the definition of welfare plan, the amendment amends the ERISA preemption provision to permit limited state regulation of such plans while retaining the full scope of the Federal regulation which is presently applicable." 128 *Cong.Rec.House* 30367 (Dec. 13, 1982).

In *FMC v. Holliday, supra,* and *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), this Court observed that ERISA treats insured plans and self-funded plans differently for preemption purposes. The reason for the difference is grounded in the interaction of the savings and deemer clause with the general preemption clause. In essence, state insurance regulation of insured plans is permissible, *but state insurance regulation of self-funded plans is preempted. Holliday,* 111 S.Ct. at 407-11; *Metropolitan Life,* 471 U.S. at 738-47. This Court reasoned that the distinction between insured and self-funded plans follows directly from the statute. "State laws that directly regulate insurance . . . do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies." *Holliday,* 111 S.Ct. at 409.

The Second Circuit showed respect for Congressional intent that self-funded MEWA ERISA plans operate under both federal and state law by premising its ruling on the finding that a trust could be licensed as an insurance company in Connecticut. App. p. 9a. The court's mistaken notion that a hybrid self-funded ERISA plan MEWA/insurance company could exist or was envisioned by Congress makes no sense in practical application; a plan is either one or the other, not both. ERISA was intended to regulate ERISA plans, not insurance com-

panies. Moreover, ERISA expressly allows multiple employers to form qualifying employee benefit plans to provide benefits to their employees. Issuance of a certificate of authority by the State of Connecticut is discretionary. It was certainly not the intent of Congress to grant discretion to the states to determine whether to allow an ERISA plan to provide benefits.

ERISA's fiduciary provisions also require that trust funds be held for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). Funding paid-in capital, surplus funds and reserves in excess of $1,000,000.00 as required under the Connecticut licensing statutes, Conn. Gen. Stat. § 38a-72, and requiring the payment of premium taxes and contributions to state claims guarantee funds for insolvent insurance companies would violate ERISA fiduciary law. The fiduciary duty to apply trust assets only for the benefit of Atlantic beneficiaries prohibits any expenditures to non-plan participants, such as the State or a claimant of an insolvent insurance company. Such requirements are thus inconsistent with ERISA and preempted. The Second Circuit erroneously determined that payment of these state regulatory fees by an ERISA plan would not violate ERISA but would constitute reasonable administrative fees.

The Second Circuit also displayed a misunderstanding of the structure of self-funded benefit programs by citing capital and reserves requirements for fully-funded MEWAs under 29 U.S.C. § 1144(b)(6)(A)(i) as a basis for the conclusion that the MEWA amendment contemplates similar requirements for self-funded MEWAs. The economic standards for reserves and contribution levels in actuality pertain to the carrier insuring the MEWA, not the plan itself. Consequently, such entities must be funded in conformity with state requirements for

insurance companies. No such requirements are necessary or applicable to self-funded plans.

Further, the restructuring of ERISA plans into insurance companies would subject the plans to the entire State law remedial scheme (unfair insurance practice acts, bad faith actions, and causes of action for fraud and punitive damages, among others) from which the framers of ERISA unequivocally intended to shield ERISA plans in order to preserve their economic ability to viably self-fund a benefit program without the specter of large court judgments threatening financial stability. This Court has consistently ruled that such state law remedies are pre-empted and unavailable to plan participants, which may bring actions against ERISA plans solely for the recovery of benefits under federal law. *See, e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1989).

The Third Circuit interprets this Court's decision in *FMC* to find for preemption if a statute has either the effect of dictating or restricting the manner in which ERISA plans structure or conduct their affairs or the effect of impairing their ability to operate simultaneously in more than one state. *United Wire Welfare Fund v. Morristown Mem. Hospital,* 995 F.2d 1179, 16 EBC 2182, 2187-2189 (3d Cir. 1993). A certificate of authority requirement constitutes a direct interference that imposes requirements on the internal design and structure of plans. Subjecting multi-state plans to differing certificate of authority requirements of differing states would make operation impossible. Consequently, the Second Circuit decision affirming a certificate of authority requirement conflicts with the Third Circuit decision in *United Wire.*

Because the Connecticult Certificate of Authority statutes conflict with ERISA and make compliance thereunder and concomitant operation as an ERISA plan a "physical impossibility," the licensing requirement upheld by the Second Circuit should have been ruled preempted.

Florida Lime & Avacad. Growers v. Paul, 373 U.S. 132, 142-43 (1963) (state statute preempted if physically impossible for compliance with both state and federal statute).

II. THE COURT OF APPEALS' DECISION RAISES AN IMPORTANT CONSTITUTIONAL ISSUE CONCERNING THE ABILITY OF STATES TO USE A LIMITED EXCEPTION TO ERISA PREEMPTION OF STATE INSURANCE REGULATION TO PROHIBIT MULTIPLE EMPLOYER ERISA PLANS FROM OPERATING UNDER ERISA TO PROVIDE BENEFITS TO RESIDENTS OF A STATE BY REQUIRING SUCH PLANS TO RESTRUCTURE AS INSURANCE COMPANIES IN ORDER TO BE REGULATED EXCLUSIVELY BY THE STATE AND ONLY IF THE STATE ELECTS TO ISSUE AN INSURANCE LICENSE AND CONFLICTS WITH DECISIONS BY THIS COURT.

The MEWA amendment allows states to enact regulations consistent with ERISA to apply to self-funded MEWA ERISA plans. Existing insurance statutes of general applicability to insurance companies are neither designed nor equipped to regulate ERISA plans. *In Re Affiliated Food Stores, Inc. Group Ben. Tr.*, 134 B.R. 215 (N.D.Tex. 1991); *FMC Corp. v. Holliday*, 111 S.Ct. at pp. 412-414 (Stevens, J. dissenting)

Several states have responsibly promulgated regulations specific to self-funded MEWAs.[2] By contrast, Connecticut has no regulatory scheme for the licensing or supervision of self-funded MEWAs. Such plans, *even if they qualify as ERISA plans*, are deemed to be fraudulent, unlicensed insurance companies and prosecuted as such. Connecticut's conduct thus falls squarely within ERISA's preemp-

---

[2] *See, e.g.*, Fla. Stat. Section 624.437 (1991); Mich. C.L. Section 500.7050 (1991); N.M. Stat. Ann. Section 59A-15-20; N.C. Gen. Stat. Section 58-49-1, *et seq.*; 1992 Okla. ALS 374 (S.B. 440).

tion clause and implicates violations of constitutional rights.

The State of Connecticut provides no notice to self-funded plans that they are (in the view of the DOI) "illegally" providing benefits to Connecticut residents; the DOI simply executes seek and destroy tactics which it admits are designed to close down, rather than regulate, any self-funded MEWA coming to the attention of the DOI. In other words, the right to self-fund a benefit program for employees is taken away by the State of Connecticut in excess of jurisdiction and without due process of law under the Fourteenth Amendment of the U.S. Constitution.

Moreover, without a uniform set of regulations applicable to all self-funded MEWAs, equal protection concerns are triggered. The Commissioner is in a position to make arbitrary and perhaps discriminatory decisions by invoking unauthorized insurer statutes to prevent MEWAs of his choosing from providing employee benefits while allowing others to continue. The potential for abuse under such a selective enforcement scheme is obvious: powerful, well-funded special-interest groups such as the Blue Cross/Blue Shield entities might persuade regulators to target MEWAs that threaten their market share, and the State interest in premium taxes might further motivate the Commissioner to accommodate such a pursuit under the mantle of "protector" of consumers' interests.

Finally, access to self-funded benefit plan arrangements is expressly provided to employers under the authority of ERISA. Since issuance of a certificate of authority is within the sole discretion of the State of Connecticut, the State is improperly empowered to block employer access to the federal regulatory program by denying a license request.

Had Congress intended in amending ERISA to allow states to abolish self-funded benefit plans, it would have

so provided. The regulatory and interpretative confusion following the amendment of ERISA and contributing to the abrogation of self-funding rights and violations of due process and equal protection under the laws is a result repugnant to ERISA and the Constitution of the United States that affects the benefits of thousands utilizing MEWAs nationwide. This Court can rectify the problem by granting *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL D. SINGER
2705 Bayview Drive
Suite B
Manhattan Beach, CA 90266
(310) 545-3826
Counsel of Record for
Petitioners Atlantic Healthcare
Benefits Trust, et al.

November 1, 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1542—August Term 1992

(Argued: May 18, 1993 Decided: August 2, 1993)

Docket No. 92-7955

ATLANTIC HEALTHCARE BENEFITS TRUST, JEFFRY C. NEAL, Trustee of Atlantic Healthcare Benefits Trust, UNITED HEALTHCARE ASSOCIATION OF AMERICA, INC. and NATIONAL INSURANCE CONSULTANTS, INC.,

Plaintiffs-Appellants,

—v.—

ROBERT R. GOOGINS, Commissioner, Department of Insurance of the State of Connecticut and THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT,

Defendants-Appellees.

Before:

WINTER and JACOBS, *Circuit Judges,*
and MUKASEY, *District Judge.**

Appeal from a decision of the United States District Court for the District of Connecticut granting summary

* Honorable Michael B. Mukasey, United States District Judge for the Southern District of New York, sitting by designation.

judgment rejecting a claim that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1988), preempts application of a State's insurance code to a multiple employer welfare arrangement.

Affirmed in part; vacated in part.

MICHAEL D. SINGER, ESQ., Manhattan Beach, CA *for Plaintiffs-Appellants.*

JOHN G. HAINES, ESQ., Hartford, CT (Richard Blumenthal, Attorney General, State of Connecticut, of counsel), *for Defendants-Appelees.*

JUDITH E. KRAMER, ESQ., Washington, D.C. (Mark I. Machiz, Karen L. Handorf, Gail Perry, United States Department of Labor) *for amicus curiae,* Secretary of Labor.

JACOBS, *Circuit Judge:*

Plaintiffs are group of individuals and entities that arrange with employers to provide employee health care benefits. When the State of Connecticut began taking steps to subject the benefits arrangement to regulation as an insurance company, the plaintiffs sued the Connecticut Commissioner of Insurance (the "Commissioner") and the Connecticut Department of Insurance. Plaintiffs seek (a) a declaration that the health care benefits they supply are furnished through a multiple employer welfare arrangement ("MEWA") that is subject to regulation under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 29 U.S.C. § 1001 *et seq* (1988), and that the preemption provisions of ERISA preclude Connecticut from regulating a MEWA as an insurance company; and (b) an injunction barring the Commissioner from requiring them to register as an insurance company.

The United States District Court for the District of Connecticut (Dorsey, *J.*) granted defendants' motion for summary judgment relying upon a 1983 amendment to the preemption provision of ERISA that permits State insurance departments to regulate MEWAs. Plaintiffs now appeal. We affirm the district court's dismissal on the merits of the claim against the Connecticut Commissioner of Insurance. The claim against the Department of Insurance is barred by the Eleventh Amendment, and we therefore dismiss that claim *sua sponte* for lack of subject matter jurisdiction.

BACKGROUND

Defendants in this action are Robert Googins, Connecticut's Commissioner of Insurance and the Department of Insurance of the State of Connecticut.

Plaintiff Atlantic Healthcare Benefits Trust ("Atlantic") is a self-funded trust organized under the laws of the Commonwealth of Virginia. United Healthcare Association of America ("United") is a Virginia corporation that (according to the complaint) "offers health and welfare benefits through [Atlantic] to participating employers and their covered employees and dependents." United established Atlantic so that employers who are "members" of United can provide medical benefits to their employees. The Atlantic trust is "self-funded," meaning that each member pays money into the trust which then pays the claims submitted by the employees of each member in accordance with the employer's health benefits plan. The cost of operating Atlantic is borne by the members who are also subject to assessments for the payment of claims.

According to the complaint, Atlantic is an employee welfare benefit plan under 29 U.S.C. §§ 1002(1), (3) and 1003 and a MEWA under § 1002(40). Sometime in 1991, Atlantic began to market its services in the state of Connecticut. Shortly thereafter, the Department of In-

surance commenced an investigation of Atlantic's activities in the State. By letter dated December 13, 1991, Jon E. Arsenault, Counsel to the Department of Insurance, informed Edward Zinner, President of Plaintiff National Insurance Consultants, that the Department was investigating Atlantic's marketing activities, and requested information. As indicated by subsequent correspondence and the affidavit of Arsenault, none of the plaintiffs provided the information. By letter dated January 10, 1992, the Department of Insurance informed Zinner that failure to comply with the request for information would lead to some unspecified further action. Plaintiffs responded to that letter by filing this lawsuit.

Promptly after commencing this suit, plaintiffs moved for summary judgment arguing that (1) Atlantic is a MEWA as that term is defined in ERISA, 29 U.S.C. § 1002(40)(A), *see* Opinion 91-32 A, Department of Labor, Pension & Welfare Benefit Programs, 1991 ERISA LEXIS 36 (August 16, 1991) (opining to Deputy Commissioner of Insurance of Pennsylvania that Atlantic is a MEWA); (2) that ERISA expressly preempts the Commissioner's authority to regulate MEWAs such as Atlantic; and (3) that the Commissioner's attempt to compel Atlantic to obtain a certificate of authority to do business as an insurance company or to comply with Connecticut's insurance regulatory requirements is therefore unlawful.

Defendants countered that Atlantic was not an employee welfare benefit plan and, even if it were, that a 1983 amendment to ERISA's preemption clause specifically authorizes states to regulate MEWAs.

The district court granted summary judgment in favor of the defendants. The district court did not determine whether or not Atlantic is an "employee welfare benefit plan" as that term is defined by ERISA; rather, the court decided that even if Atlantic is such a plan, Atlantic is nevertheless subject to regulation by the states by virtue

of a 1983 amendment to ERISA specifically permitting states to regulate MEWAs unless such regulation is inconsistent with ERISA. Finding that Connecticut's licensing requirement is not inconsistent with ERISA, the district court dismissed the suit.

On appeal, plaintiffs contend that self-funded health insurance plans are exempt from state regulation, that Connecticut's regulatory scheme for granting certificates of authority to insurance companies is "comprehensively inconsistent" with ERISA, and that the amendment to ERISA authorizing state regulation of MEWAs merely permits states to adopt legislation that regulates MEWAs *as* MEWAs, but does not permit states to regulate MEAWs as if they were insurance companies. Finally, plaintiffs contend that they should have been permitted to amend their complaint to allege that Atlantic is not a MEWA after all, and is therefore outside the scope of the 1983 amendment to ERISA. We affirm in every respect, except that we vacate the district court's decision to the extent it relates to the Department of Insurance because the claim against that entity is barred by the Eleventh Amendment.

DISCUSSION

I. Eleventh Amendment

Although the parties do not address the Eleventh Amendment in their briefs, we raise it *sua sponte* because it affects our subject matter jurisdiction. *See Esparza v. Valdez,* 862 F.2d 788, 793-94 (10th Cir. 1988) (court of appeals may raise Eleventh Amendment jurisdictional bar *sua sponte*), *cert. denied,* 492 U.S. 905 (1989); *cf. Edelman v. Jordan,* 415 U.S. 651, 678 (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *Shabbazz v. Coughlin,* 852 F.2d 697, 699-700 (2d Cir. 1988). The Eleventh Amendment bars suits against a state agency, such as the Connecticut De-

partment of Insurance, absent a waiver of sovereign immunity. *E.g. Alabama v. Pugh,* 438 U.S. 781 (1978) (per curiam). This court therefore lacks jurisdiction over plaintiffs' claims against the Department of Insurance. However, under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), we have jurisdiction over defendant Googins.

II. ERISA Preemption

The preemption clause of ERISA provides generally that "the provisions of [ERISA] shall supersede any and all laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. § 1144(a) (1988). This "deliberately expansive" preemption clause, *Pilot Life Ins. Co. v. Deadeaux,* 481 U.S. 41, 45 (1987), reflects the intent of Congress to create a comprehensive national scheme for the regulation of employee welfare benefit plans. However, since Congress did not thereby intend to impinge upon the power of the states to regulate the insurance industry, the preemption clause is limited by a saving clause:

> [N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . .

29 U.S.C. § 1144(b)(2)(A). This saving clause is in turn limited by a "deemer" clause providing that neither an employee benefit plan nor a trust created pursuant to such a plan "shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . ." 29 U.S.C. § 1144(b)(2)(B).

In *FMC Corp. v. Holliday,* 498 U.S. 52, 58 (1990), the Supreme Court described the interplay between the deemer clause and the saving clause:

> The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA. The saving clause returns to the States the power to enforce those state laws that "regulat[e] insuance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

FMC held that the deemer clause was violated by a Pennsylvania statute that regulated a single employer self-funded employee welfare benefit plan. Plaintiffs argue on this appeal that under *FMC* no state may regulate any self-funded health benefits plan as an insurance company.

There is a decisive distinction, however, between the single employer plan at issue in *FMC* and an arrangement for admisintering the health plans of multiple employers, *i.e.*, MEWAs. In a 1983 amendment to ERISA, Congress separately and directly prescribed the authority of states to regulate MEWAs:

> Notwithstanding any other provision of this section—
>
> (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured . . . any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—
>
> (I) standards requiring the maintenance of specified levels of reserves . . . and
>
> (II) provisions to enforce such standards, and
>
> (ii) in the case of any employee welfare benefit plan which is a multiple employer welfare arrangement, in

> addition to this subchapter, any law of any state which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

29 U.S.C. § 1144(b)(6) (the "MEWA clause"). We agree with the Commissioner and the Department of Labor as *amicus* that this provision is an exception to the deemer clause, and that this provision authorizes states to regulate MEWAs as insurance companies. *See Atlantic Health Care Benefits Trust v. Foster,* 809 F.Supp. 365 (M.D. Pa. 1992).

As to the permissible scope of state insurance regulation, the MEWA clause distinguishes between a MEWA that is fully-insured and one that is not. In the case of a fully insured MEWA, a state's regulatory power is limited to mandating and enforcing reserve requirements. 29 U.S.C. § 1144(b)(6)(i). Broader state regulation of other MEWAs is permissible so long as the regulation is not inconsistent with ERISA. It is undisputed in this case that Atlantic is not fully insured: in funds benefits by contributions and assessments paid by the member employers. Connecticut therefore may regulate Atlantic so long as the regulations are not inconsistent with ERISA.

Plaintiffs argue that even if the MEWA clause does permit a state to regulate self-funded MEWAs, a state cannot do so simply by designating MEWAs as insurance companies subject to the existing framework of insurance regulation. *See In re Affiliated Food Stores, Inc. Group Benefits Trust,* 134 B.R. 215 (N.D. Tex. 1991) (holding that Texas may not regulate MEWAs as insurance companies). If Connecticut decides to regulate MEWAs, it must, according to Atlantic, create a separate MEWA scheme of regulation, as some other states have done. We disagree. The MEWA clause specifically states that "any law of any state which regulates insurance may apply [to a MEWA] to the extent not inconsistent with the preceding sections of this title." Under the plain language of

this clause and subject to the limitations stated therein, Connecticut may regulate Atlantic under its insurance code.

Plaintiffs argue that there are a number of provisions of Connecticut's insurance law that are inconsistent with ERISA. Plaintiffs first argue that the Connecticut registration scheme is fundamentally incompatible with ERISA because (a) Atlantic must be maintained as a trust in order to qualify as an ERISA plan; and (b) the Connecticut insurance code does not authorize issuance of a certificate of authority to a trust. *See* Conn. Gen. Stat. §§ 38a-1(11) and 38a-41(a). We see nothing on the face of the cited provisions of the Connecticut insurance code that compels such a conclusion; indeed our reading of the statute suggests that precisely the opposite is so. Section 39a-41(a) prohibits any insurance company engaging in the insurance business other than under the terms of a certificate of authority obtained from the Commissioner. The term "insurance company" includes a "corporation, association, partnership or *combination of persons* doing any kind or form of insurance business." Section 38a-1(11) (emphasis added). The term "[p]erson includes "an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization or other legal entity." Section 38a-1(14). It therefore appears that under Connecticut law a business trust or other legal entity may be an insurance company. Atlantic also contends that Conn. Stat. § 38a-72 provides solely for the licensing of corporations and mutual insurance companies, a limitation we do not see in our review of that section.

Indisputably, Connecticut insurers are subject to minimal capital and reserve requirements. Atlantic asserts that such requirements are inconsistent with ERISA because imposing such reserves would eliminate one of the economic advantages of the MEWA structure and would create additional tax liability. This argument is frivolous.

All state regulation entails marginal costs; since ERISA allows state regulation, the associated costs cannot be deemed inconsistent with ERISA's regulatory scheme. Moreover, the MEWA clause expressly contemplates the imposition of minimum capital and surplus requirements on MEWAs. *See* 29 U.S.C. § 1144(b)(6)(i).

Plaintiffs also contend that Connecticut imposes certain fees on insurance companies that are inconsistent with ERISA's requirement that funds be held in trust for the participants and be used only to provide benefits and to defray administrative costs. 29 U.S.C. § 1104(a)(1)(A). In our view, regulatory fees can be legitimate administrative expense.

In sum, plaintiffs have pointed to no requirement of the Connecticut code that appears in conflict with ERISA. True, Conn. Gen. Stat. § 38a-41(a) requires that applicants file their certificates of incorporation or charters; but that section does not state that insurance companies that are not incorporated must do so, or that the commissioner will not accept "not applicable" for an answer.

Accordingly, the Superintendent is not barred from regulating Atlantic as an insurance company.

Plaintiffs now ask that we remand the case to allow it to amend its complaint to allege that their plan is not in fact a MEWA. Instead, they wish to allege that Atlantic is a single employer plan because ERISA's definition of "employer" (29 U.S.C. § 1002(5)) has been interpreted to include a "bona fide group or association of employers." *See* Opinion Letter 90-07, Department of Labor, 1900 ERISA LEXIS 7 (April 6, 1990). Plaintiffs did not raise this argument to the district court—in fact, Atlantic vigorously argued that it was a MEWA—and we consider the argument (such as it is) waived.

CONCLUSION

We have examined all of plaintiffs' other arguments on appeal and find them meritless. Accordingly, we affirm the decision of the district court except as it applies to claim asserted against the Department of Insurance over which we have no jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Docket No. 2:92cv00212 (PCD)

ATLANTIC HEALTHCARE BENEFITS TRUST, *et al.*

—vs—

ROBERT R. GOOGINS, Commissioner of the Department of Insurance of the State of Connecticut, *et al.*

RULING ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

[Filed July 27, 1992]

Plaintiffs, including Atlantic Healthcare Benefits Trust ("Atlantic"), a self-funded trust, bring this action against the Commissioner of the Department of Insurance of the State of Connecticut for a declaration that state insurance laws, regulations, and bulletins are preempted by ERISA, and further seek to enjoin the Commissioner from preventing plaintiffs from offering a health and welfare benefit plan in Connecticut. The parties have filed cross-motions for summary judgment.

Background

Plaintiffs contend that Atlantic is a multiple employer welfare arrangement ("MEWA") and employee welfare benefit plan maintained and established pursuant to the provisions of ERISA. Allegedly, in November of 1991, the Commissioner initiated an investigation aimed at pre-

venting plaintiffs from maintaining an employee welfare benefit plan on the grounds that plaintiffs were unauthorized insurers under the Connecticut Insurance Code. Complaint ¶ 17. Plaintiffs claim that defendants' attempts to regulate Atlantic are contrary to ERISA, which supersedes state law. Complaint ¶ 19. Defendants respond that plaintiffs are operating in contravention of local insurance laws and that ERISA reserves to the states the enforcement of local codes not in conflict with ERISA.

Discussion

Motions for summary judgment involve a determination as to whether there exists any genuine issue of material fact. The applicable standard of review is articulated in greater detail in *Cote v. Durham,* 754 F. Supp. 18 (D. Conn. 1991).

An "employee welfare benefit plan" is defined by ERISA, 29 U.S.C. § 1002(1) as follows:

> [A]ny plan, fund or program which was heretofore or is hereafter established or maintained by en employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .

ERISA's "savings clause" broadly preempts state statutes regulating that which is covered by ERISA:

> Except as provided in subsection (b) . . . the provisions of [ERISA] shall supersede any and all laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

ERISA's "deemer clause" further limits and refines the boundaries of state regulatory codes:

> [Neither an employee benefit plan nor a trust established under such plan] shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Finally, Congress amended ERISA in 1983 to provide, in pertinent part:

> [n]otwithstanding any other provision of this section . . . .
>
> > (i) in the case of an employee welfare benefit plan which is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any state which regulates insurance may apply to such arrangement to the extent that such law provides . . . .
> >
> > (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any plan or any trust established under such plan, must meet in order to be considered under such law able to pay benefits in full when due, and
> >
> > (II) provisions to enforce such standards, and
> >
> > . . . .
> >
> > (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any state which regulates insurance may apply to the extent not inconsistent with the preceding sections of this chapter.

21 U.S.C. § 1144(b)(6)(A). Defendants submit that subsection (ii) above effectively reserves to the state the

regulation of MEWAs, provided such regulation does not conflict with any substantive ERISA provision. Conversely, plaintiffs argue that such an interpretation would vitiate the meaning of the "deemer clause" and that requiring an employee welfare benefit plan to become licensed as an insurer, as defendants assert, conflicts with a preceding section of ERISA.

Notwithstanding the parties' claims that the language of the statute is crystal clear, with opposing results, the complex and ambiguous interplay between the relevant statutory sections would seem to suggest, at best, a potential for endless circularity in reasoning and interpretation. With that in mind, it is not inappropriate to look to legislative history for guidance, *see Berger v. Hecker*, 771 F.2d 1556 (2d Cir. 1985):

> [In] the case of a multiple employer welfare arrangement that is not fully insured, [29 U.S.C. § 1144 (b)(6)] exempts from ERISA preemption laws that regulate insurance . . . .

Conference Report, Pub. L. No. 97-473, § 302 (1982). The congressional record regarding the adoption of the 1983 MEWA amendment is illuminating:

> In the second category are all other welfare plans which first, meet the definition of multiple employer welfare arrangement, second, are not fully insured, and third, have not obtained the abovementioned exemption from the Department of Labor. These plans are subject to ERISA and whatever State law may apply to them except to the extent that the State law may be inconsistent with the Federal law under Title I of ERISA.

See also, MDPhysicians & Associates v. Wrotenbury, 762 F. Supp. 695, 699 (N.D. Tex. 1991) ("As for MEWAs which are not fully insured, any law may apply to the extent not inconsistent with the provisions of ERISA.

. . . The Texas requirement that the MDP Plan apply for a certificate of authority to conduct business in the State of Texas is not inconsistent with ERISA."). Hence, although defendants' interpretation of the MEWA amendment, adopted herein, leaves somewhat open to question the continued efficacy of the earlier "deemer clause," plaintiffs' construction would negate the purpose of an amendment expressly overriding the statute's prior provisions, rendering the amendment internally inconsistent with itself.[1] In consequence, the Commissioner seeks to regulate plaintiffs' enterprise in conformity with local insurance codes which are found not to be preempted by ERISA. Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment (document #18) is granted and plaintiffs' motion for summary judgment (document #21) is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 27th day of July, 1992.

/s/ Peter C. Dorsey
PETER C. DORSEY
United States District Judge

---

[1] That is, the amendment cannot be read, on the one hand, to supplant previous provisions of the statute, while on the other hand, to be in conflict with and subordinate to those same provisions.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

2:92 CV 00212 PCD

ATLANTIC HEALTHCARE BENEFITS TRUST, *et al.*

vs.

ROBERT R. GOOGINS, Commissioner of the Department of Insurance of the State of Connecticut, *et al.*

JUDGMENT

[Filed July 29, 1992]

The action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the defendant's motion and denying the plaintiff's motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut this 29th day of July 1992.

KEVIN F. ROWE
Clerk

By: /s/ Dennis P. Iavarone
DENNIS P. IAVARONE
Deputy in Charge

APPENDIX D

Bulletin Number HC-43

MULTIPLE EMPLOYER WELFARE ARRANGEMENTS (MEWAs)

July 25, 1990

This department is in receipt of a letter from the U.S. Labor Department citing the growing problems of MEWAs that are operating in an uninsured, unfunded and sometimes fraudulent manner. Reference is also made to promoters who have sought to exploit the lack of affordable health care coverage through abusive and fraudulent practices.

The problems that are attendant to MEWAs are no more nor no less than those that were brought to the attention of the Department by the establishment of uninsured Multiple Employer Trusts (METs) over the years.

The Department's position with respect to so called self-insured METs and now MEWAs is that they are doing an insurance business without authority or license to do so and are, therefore, illegal operations.

The Departments herein advises that it will consider any company or agent involved with the establishment of a MEWA to be aiding and abetting an unlicensed company to do business in this state whether acting as a third party administrator, the writer of a stop-loss policy or in any other capacity.

All companies are herein directed to advise their agents of the Department's position.

The Department will continue to recognize that certain plans fall under Federal preemption under the Employee Retirement Income Security Act (ERISA) and will not

interfere with any plan that has a clear and concise statement from the U.S. Labor Department that it is ERISA exempt.

In the interim, the Department will view any uninsured MEWA, MET or VEBA (Voluntary Employee Benefit Association) as an illegal operation.

PETER F. KELLY
Insurance Commissioner

(2)

Supreme Court, U.S.
FILED
DEC - 1 1993
OFFICE OF THE CLERK

No. 93-685

In The

Supreme Court Of The United States

October Term, 1993

ATLANTIC HEALTHCARE BENEFITS TRUST, NATIONAL INSURANCE CONSULTANTS, INC. UNITED HEALTHCARE ASSOCIATION OF AMERICA ET AL.,

Petitioners

v.

ROBERT R. GOOGINS, COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT ET AL.,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

*JOHN G. HAINES
GREGORY T. D'AURIA
Assistant Attorneys General
Office of the Attorney General
110 Sherman Street
Hartford, CT 06105
(203) 566-4899

**Counsel of Record*

BEST AVAILABLE COPY

Printed by
Bowcio's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4354

QUESTION PRESENTED FOR REVIEW

Whether 29 U.S.C. § 1144(b)(6)(A)(ii) allows the State of Connecticut to regulate self-funded Multiple Employer Welfare Arrangements (MEWAs) under its insurance laws, including its registration scheme for insurance companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S APPLICABLE DECISIONS 5

II. THERE EXISTS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS THAT REQUIRES THIS COURT'S ATTENTION 6

III. THE DECISION BELOW CORRECTLY INTERPRETED THE RELEVANT STATUTORY PROVISIONS AND NO "SPECIAL AND IMPORTANT" REASONS WARRANT THIS COURT'S CONSIDERATION 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page**

Atlantic Health Care Benefits Trust v. Foster, 809 F.Supp. 365 (M.D. Pa. 1992), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993) 2, 6, 9

Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1 (2d Cir. 1993) 1, 6

FMC Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) 5, 6

Massachusetts v. Morash, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) 7

MDPhysicians & Associates, Inc. v. Wrotenbury, 762 F.Supp. 695 (N.D. Tex. 1991), *aff'd*, 957 F.2d 178 (5th Cir. 1992) 9

National Business Association Trust v. Morgan, 770 F.Supp. 1170 (N.D. Ky. 1991) 8

United Wire v. Morristown Memorial Hospital, 995 F.2d 1179 (3d Cir. 1993) 6

Statutes:

29 U.S.C. § 1002(40)(A) 2

29 U.S.C. § 1144(a) 7

29 U.S.C. § 1144(b)(6)(A) 2, 4, 7

Other Authorities:

H.R. Conf. Rep. 984, 97th Cong., 2nd Sess. (1982), *reprinted in* 1982 U.S. Cong. & Ad. News 4598 8

Secretary of Labor Advisory Opinion, 90-18A (July 2, 1990) 9

U.S. General Accounting Office, Report to Reps. Pickle, Hughes, and Boehlert, Doc. No. B-242197 3

U.S. Senate, Committee on Government Affairs, Permanent Subcommittee on Investigations -- Interim Report on Combatting Fraud and Abuse in Employer Sponsored Health Benefit Plans, 102nd Cong., 2nd Sess., Mar. 12, 1992 3

128 Cong. Rec. H303566-57 (daily ed. Dec. 13, 1982) 3, 8

No. 93-685

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ATLANTIC HEALTHCARE BENEFITS TRUST,
NATIONAL INSURANCE CONSULTANTS, INC.
UNITED HEALTHCARE ASSOCIATION
OF AMERICA, ET AL.
Petitioners

v.

ROBERT R. GOOGINS, COMMISSIONER
OF THE DEPARTMENT OF INSURANCE
OF THE STATE OF THE CONNECTICUT, ET AL.
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The relevant facts and proceedings in this case are essentially undisputed as found in the Second Circuit's opinion, now reported as *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1 (2d Cir. 1993).

The issue below was one of statutory construction involving the so-called MEWA exemption to the

Employee Retirement Income Security Act ("ERISA"). The term "MEWA" stands for Multiple Employer Welfare Arrangement which includes plans "established or maintained" for the purpose of offering certain benefits, including health care, "to the employees of two or more employers ... or their beneficiaries." 29 U.S.C. § 1002(40)(A).

The Petitioners, United Healthcare Association of America ("United") and Atlantic Healthcare Benefits Trust ("Atlantic"), alleged that they were a self-funded MEWA subject to ERISA. Shortly after Connecticut's Insurance Commissioner began investigating the sale of health care benefits by the Petitioners, they sued claiming that ERISA preempts the Commissioner's authority to regulate MEWAs and that any attempt to subject this self-funded MEWA to the state registration scheme for insurance companies (or any other insurance regulatory provision) was unlawful.

In upholding the District Court's grant of summary judgment in favor of the Commissioner, the Court of Appeals agreed with the State and the United States Department of Labor as *amicus* that 29 U.S.C. § 1144(b)(6)(A) (the "MEWA clause") is an express exception to ERISA's broad preemption language, and it authorizes the states to regulate MEWAs as insurance companies. The Second Circuit's decision in this matter was quickly followed by the Third Circuit in *Atlantic Health Care Benefits Trust v. Foster,* 809 F.Supp. 365

(M.D. Pa. 1992), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993).

The MEWA provisions were added to ERISA in 1983 in response to what the co-sponsor of the amendment called "an increasing problem having the potential to become the 'most sophisticated and profitable white-collar crime in America.' In a growing number of states across the nation, operators of bogus insurance trusts are bleeding the trusts of funds and claiming bankruptcy, thus leaving thousands of people holding the bag for millions of dollars in unpaid hospital and medical bills." 128 Cong. Rec. H30356-57 (daily ed. Dec. 13, 1982) (statement of Rep. Erlenborn).[1/] Congress responded by exempting multiple employer welfare arrangements from ERISA preemption and subjecting them to state insurance laws. The MEWA exemption states, "Notwithstanding any other provision of this [preemption] section," fully insured MEWAs which are employee welfare benefit plans are subject to

---

1/ Continuing abuses by MEWAs are graphically documented in two recent federal reports. *See* U.S. Senate, Committee on Government Affairs, Permanent Subcommittee on Investigations -- Interim Report on Combatting Fraud and Abuse in Employer Sponsored Health Benefit Plans, 102nd Cong., 2nd Sess., Mar. 12, 1992 (typical MEWA fraud is a classic ponzi scheme); U.S. General Accounting Office, Report to Reps. Pickle, Hughes, and Boehlert, Doc. No. B-242197. (Between 1988 and 1991 MEWAs left at least 398,000 people with over $123 million in unpaid claims.)

state regulation covering reserves and contributions. 29 U.S.C. § 1144(b)(6)(A). For less than fully insured plans, like the Petitioners', the exemption continues by providing that

> (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any state which regulates insurance may apply to the extent not inconsistent with the preceding sections of this chapter.

29 U.S.C. § 1144(b)(6)(A) (emphasis added).

After examining the language of the statute, its legislative history, and pertinent cases, the Court of Appeals concluded that, having alleged that Petitioners' health care plan is a self-funded MEWA, it comes within the terms of the above-quoted section and is subject to the State of Connecticut's insurance laws. The Court found further that nothing in ERISA prevents the application of state statutes requiring a license.

REASONS FOR DENYING THE WRIT

The Petitioners have advanced no persuasive argument that would warrant this Court's review of this case. There is no split among the circuits on any issue raised in this case, and the Second Circuit's decision in no way conflicts with any decision of this Court. No important question of federal law is raised that has not

been settled, and the result below was undoubtedly correct.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S APPLICABLE DECISIONS

The Petitioners seek desperately to manufacture a conflict between the Second Circuit's decision and this Court's decision in *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990), in which the Court described the interplay between ERISA's so-called "preemption," "saving," and "deemer" clauses. The Court stated:

> [ERISA's] pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA. The saving clause returns to the States the power to enforce those state laws that "regulat[e] insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

Id.

The Court went on to hold that a Pennsylvania statute that regulated a single employer self-funded employee welfare benefit plan violated ERISA's deemer clause, and was therefore preempted by ERISA. *Id.*

The Petitioners contend that *FMC* stands for the proposition that ERISA preempts all state insurance laws regarding any self-funded benefit plan. This argument totally ignores the MEWA amendment which created an exception to ERISA's preemption, saving, and deemer clauses for multiple employer plans. *FMC* concerned a distinction between self-funded and fully insured single employer plans. As the Second Circuit noted, however, "there is a decisive distinction ... between the single employer plan at issue in *FMC* and an arrangement for administering the health plans of multiple employers, i.e., MEWAs." *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 5 (2d Cir. 1993). Thus, there is no conflict between the Second Circuit's decision in this case and this Court's holding in *FMC*.

II. THERE EXISTS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL THAT REQUIRES THIS COURT'S ATTENTION

This case does not call upon this Court to settle a split of authority among the Circuit Courts of Appeal. In fact, in the only federal appellate court decision addressing the issue presented here, the Third Circuit agreed with the Second Circuit's judgment in this case. *See Atlantic Health Care Benefits Trust v. Foster*, 809 F.Supp. 365, 374-75 (M.D. Pa. 1992), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993). Moreover, the Petitioners' claim that *United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179 (3d Cir. 1993), conflicts with the Second

Circuit's ruling in this case is simply wrong. It does not concern MEWAs or 29 U.S.C. § 1144(b)(6)(A), the statute at issue here, but rather dealt with 29 U.S.C. § 1144(a), ERISA's general preemption clause.

III. THE DECISION BELOW CORRECTLY INTERPRETED THE RELEVANT STATUTORY PROVISIONS AND NO "SPECIAL AND IMPORTANT" REASONS WARRANT THIS COURT'S CONSIDERATION

The Second Circuit's decision is correct on the merits, finding support in the statutory language, this Court's decisions, and the legislative history of the MEWA amendment. Further, the Secretary of Labor, who is responsible for enforcing the reporting, disclosure, and fiduciary requirements imposed on private employee benefit plans under ERISA, participated as *amicus curiae* in the Court below and supported the defendants' position. This Court has accorded deference to the Secretary's interpretation of ERISA's provisions. *See Massachusetts v. Morash*, 490 U.S. 107, 116, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) (Secretary of Labor's views regarding interpretation of ERISA entitled to deference).

This case does not involve any weighty constitutional issues and is essentially a straightforward matter of statutory construction. 29 U.S.C. § 1144(b)(6)(A) -- the MEWA exemption -- begins: "Notwithstanding any other provision of this section...." Thus, Congress' intent to exclude MEWAs from the earlier preemption

provisions of 29 U.S.C. § 1144, including the "savings" and "deemer" clauses, could not be clearer. *See National Business Association Trust v. Morgan*, 770 F.Supp. 1170, 1176 (N.D. Ky. 1991) (the "plain and unambiguous language of 29 U.S.C. § 1144(b)(6)(A)(ii)" makes self-funded MEWAs subject to state laws that regulate insurance provided not inconsistent with Title I of ERISA). The Petitioners' argument that the "deemer" clause still applies to MEWAs not only contravenes the plain language of the MEWA exemption but would render it totally meaningless.

The legislative history of the MEWA amendment makes clear that it was intended to permit states directly to regulate MEWAs under their insurance laws, which the "deemer" clause would otherwise prevent. *See* 128 Cong. Rec. H303566-57 (daily ed. Dec. 13, 1982) (statement Rep. Erlenborn) (non-fully insured MEWAs subject to ERISA and whatever state law may apply, except to the extent that state law may be inconsistent with Title I of ERISA); *see also* H.R. Conf. Rep. 984, 97th Cong., 2nd Sess. (1982), *reprinted in* 1982 U.S. Cong. & Ad. News 4598, 4604.

Finally, the Petitioners' argument that requiring a self-funded MEWA to obtain a certificate of authority or license to do business as an insurance company is inconsistent with Title I ERISA is simply unsupported. Aside from conclusory statements, they have failed to show any such inconsistency. Unlike the comprehensive regulations imposed on pension plans, "ERISA 'does

not regulate the substantive content of employee welfare benefit plans.'" *MDPhysicians & Associates, Inc. v. Wrotenbury*, 762 F.Supp. 695, 699 (N.D. Tex. 1991), *aff'd*, 957 F.2d 178 (5th Cir. 1992), quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S. Ct. 2380, 85 L.Ed.2d 728 (1985). The cases and legislative history make clear that Congress intended to regulate multiple employer plans to prevent fraud and abuse, by deferring to state insurance laws in the MEWA exemption, including requirements for a license or certificate of authority to transact an insurance business. *Atlantic Health Care Benefits Trust v. Foster*, 809 F.Supp. 365, 374 (M.D. Pa. 1991), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993); *MDPhysicians & Associates, Inc. v. Wrotenbury*, 762 F.Supp. 695, 699 (N.D. Tex. 1991) *aff'd*, 957 F.2d 178 (5th Cir. 1992) (requirement that plan obtain an insurance license is not inconsistent with ERISA). This is also the position of the Secretary of Labor. Secretary of Labor Advisory Opinion, 90-18A (July 2, 1990).

In sum, the Petitioners have failed to show any conflict between state insurance laws and Title I of ERISA.

CONCLUSION

For all of the reasons recited above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

ROBERT R. GOOGINS
DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL

* John G. Haines
Gregory T. D'Auria
Assistant Attorneys General
110 Sherman Street
Hartford, CT 06105
Tel. (203) 566-4899

* Counsel of Record